Filed 6/12/03

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| RICHARD HERR,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>NESTLÉ U.S.A., INC.,<br><br>Defendant and Appellant. | B143831<br><br>(Los Angeles County<br>Super. Ct. No. BC165528) |

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Robert H. O'Brien, Judge. Affirmed.

Paul, Hastings, Janofsky & Walker, George W. Abele, Heather A. Morgan; Ford & Harrison, Norman A. Quandt and Kari Haugen for Defendant and Appellant.

Pine & Pine, Norman Pine, Beverly Tillet Pine; Kenneth A. Rivin; and Alvin Pittman for Plaintiff and Appellant.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. The nonpublished portions are enclosed by double brackets. The portions to be published are as follows: the beginning of the opinion through Nestlé's Contentions; section 2 of the Discussion relating to Nestlé's contentions; and the Disposition.

Defendant and appellant Nestlé USA, Inc. (Nestlé) appeals a judgment in favor of plaintiff Richard Herr (Herr) following a jury trial of an age discrimination suit resulting in a $5,163,600 verdict. Nestlé also seeks review of an order denying its motion for judgment notwithstanding the verdict (JNOV), and a postjudgment attorney fee award of $1,788,159.

Herr cross-appeals, contending the trial court erred in granting nonsuit on his punitive damages claim.

The issues presented include the sufficiency of the evidence to support the age discrimination claim, whether the trial court should have allowed the punitive damages claim to go to the jury, whether the damages and attorney fee award are excessive, and alleged evidentiary and instructional errors.

We find the verdict is supported by the evidence and perceive no error in any of the trial court's rulings. Therefore, the judgment and orders are affirmed.

In the published portion of the opinion, we address Nestlé's contention that the trial court erred in enjoining it pursuant to the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) from discriminating against employees age 40 and over.

The UCL defines unfair competition as including "any *unlawful*, unfair or fraudulent business act or practice . . . ." (Bus. & Prof. Code, § 17200, italics added.) The California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) makes it an unlawful employment practice for an employer to engage in age discrimination. (Gov. Code, § 12940, subd. (a).) [1] An employer which practices age discrimination has an unfair competitive advantage over employers who comply with the FEHA because older workers frequently are more highly compensated than their younger colleagues. Further, the UCL's remedies are cumulative to the remedies available under the FEHA. (Bus. & Prof. Code, § 17205.) Therefore, injunctive relief under the UCL is

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[1] "Age" refers to the chronological age of any individual who has reached his or her 40th birthday. (Gov. Code, § 12926, subd. (b).)

an appropriate remedy where a business has engaged in an unlawful practice of discriminating against older workers.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*[2]

a. *Evidence establishing Nestlé's preference for younger employees.*

In 1985, the Carnation Company, located in Los Angeles, was acquired by Nestlé S.A., a Swiss company. For a number of years, Carnation continued to operate as it had in the past. However, in the early 1990's, Nestlé S.A.'s chief executive officer and chairman of the board of directors, Helmut Maucher (Maucher), decided to bring Carnation and Nestlé's other American companies under one roof, resulting in the formation of Nestlé U.S.A.

At a management meeting in October 1990, Robert Mason, an executive vice president, presented Nestlé's views regarding its Carnation employees. Mason said Carnation employees were older employees, with an average age of 43 and with 15 or 17 years of service and it was Nestlé's "policy to promote young, energetic people in management positions." Mason remarked that Carnation "had a lot of deadwood in it" and instructed that staff "see about getting rid of the deadwood." One of the individuals present at this meeting was James Person, who was then over 43 years of age and serving as Carnation's director of environmental affairs. Person testified he was shocked to hear that his employment at Nestlé would be limited because of his age.[3]

In 1988, Carnation's EEO policy stated the company was committed to "equal opportunity in all matters of employment without consideration of a qualified individual's race, sex, *age*, color, religion, national origin . . . ." (Italics added.) The 1993 policy statement, the first one issued after the Nestlé transition, conspicuously

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[2] The evidence is set forth in the light most favorable to the judgment. (*Gyerman v. United States Lines Co*. (1972) 7 Cal.3d 488, 492, fn. 1.)

[3] Person was fired by Nestlé in 1992.

omitted "age" as an enumerated category. [4] Age was restored as a protected category two years later, after Nestlé was sued for age discrimination.

On December 1, 1993, Maucher, who headed Nestlé, issued a memorandum entitled "Objectives 1994." With respect to human resource policies, Maucher directed that Nestlé "[c]ontinue hiring, identifying and developing young people to have in the long-term enough resources for future management."

b. *Evidence establishing Nestlé's failure to promote Herr was age-related*.

In early 1989, at the age of 41, Herr took a position at Carnation as an internal auditor. During the interview process, Herr was assured that Carnation promotes from within. One year later, Herr was promoted to a manager position. This was Herr's final promotion. The transformation of Carnation to Nestlé was under way.

In 1991, Herr received a positive performance evaluation, with an "E" (exceeded expectations), the company's highest rating, in the areas of organizing, controlling and communication, and an M (met expectations) in all other areas. In 1992, Herr received an even better review, garnering "E" ratings in nine distinct areas: controlling, utilization of time, budget and expense control, presentation skills, quantity of work, self control, dependability, cooperation, and quality of work. Herr was then ready to move on within the organization.

In 1992, when the position of Director of Financial Reporting became available, Herr, then 45 years old, applied for it. Herr had the training and qualifications for the job, including over 20 years of experience at Mobil and Carnation. However, Nestlé gave the position to Greg Geane, age 31, who possessed less than 10 years of business experience.

In the summer of 1992, in an attempt to become more well rounded professionally, Herr also applied for two lateral manager positions involving financial operations for Nestlé foreign trade. Although Herr had substantial experience qualifying him for those

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[4] Nestlé attributed the omission to a typographical error.

positions, they went to Dan Stroud, age 32, and Ruth Ause, age 31. As contrasted with Herr's two decades of experience, Stroud had only two and a half years of finance experience. Further, Ause had received unfavorable performance reviews, and recently had been demoted due at least in part to performance reasons. Mary Lou Wallace, age 31 and a director of finance, rejected Herr and testified she did not care what Herr's performance history had been.[5]

In the summer of 1993, Herr's supervisor, Barbara Coad, age 43, was removed by Jack Mulhern, senior vice president in finance, from her position as director of sales financial services, a position she had held since 1985. As director, she supervised about 40 people; in her new position, she supervised none. A year and a half later, Coad left the company.

Herr was well qualified for Coad's director position. He had worked directly under Coad for three years and had experience in all aspects of her job. The job description specified a "minimum of ten years' business experience," and that a CPA or MBA was preferred. Herr met these requirements. However, Herr was not interviewed for the position. Instead, Mulhern selected 32-year-old Dan Stroud, who lacked 10 years' business experience and had neither a CPA nor an MBA degree.

Herr then expressed interest in the position left open by Stroud's promotion. Herr was told the job already had gone to Dawn Striff, who was 29 years old and had been with Nestlé only a short time. Wallace, who decided to promote Striff, admitted that Herr met all the qualifications for the position. However, Herr was denied an opportunity to interview for the position, which was not even posted, contrary to Nestlé's own policy.

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[5] Wallace admitted that during her tenure at Nestlé, while Herr was still there, of the 12 positions she filled, none went to anyone over the age of 40.

Despite repeated inquiries, Herr was never told why he was passed over for these various positions. [6]

Herr began to feel depressed, unwanted and hopeless and spoke with Mike Mayhall, who had hired Herr at Carnation. Mayhall told Herr, that he, Herr, "wasn't one of Jack [Mulhern's] boys. I wasn't someone in my early thirties that could be promoted throughout the organization. He told me that my responsibility was going to be to train the young managers of Nestlé. And he also told me that Jack had made a comment to him that he was getting a little bit long in the tooth." [7]

Between January 1992 and January 1996, Mulhern promoted five people to the position of manager or higher. None was 40 or over; they ranged in age from 28 to 35.

Herr continued to seek advancement at Nestlé. He learned of openings for the positions of controller in Nestlé Brand Food Service, and director of financial reporting. Herr was qualified for both the controller and director positions and previously had interviewed for the director position, but now was refused an interview for either one. The controller position went to 31-year-old Greg Geane and the director position went to 32-year-old Dave Frasher. Herr asked Tim Alders in the human resources department why he wasn't able to get an interview. Alders responded that Eric Bredeson, the hiring manager, "had made a comment to him that this would be my last promotion."

Around October 1993, Herr met with Mulhern to discuss opportunities for advancement at Nestlé. Mulhern told Herr "there were going to be a lot of opportunities opening up in the future." Mulhern stated he would reassign Herr to a different position as manager of special projects, reporting directly to Mulhern, to give Herr a broader background to better qualify him for future openings. In December 1993, Herr moved into his new position under Mulhern as manager of special projects.

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[6] According to Nestlé's director of human resources, Kelly Diehl, the failure to inform Herr of the reason he was passed over violated the company's career development program.

However, Herr's new position did not lead to advancement. Instead, in February 1994, after just two months, Mulhern gave Herr a layoff notice and told him his position, the one that was to lead to new opportunities, was being eliminated. The layoff notice was accompanied by a summary of termination benefits, requesting Herr to sign a settlement agreement and release of all claims, including age discrimination, in order to receive the termination benefits.

Before Herr's scheduled departure date, Mulhern offered him a temporary position as a manager in the sales financial services department, a position that was itself slated for elimination. That job became available because one DeMartini was not performing satisfactorily. [8] Mulhern told Herr the assignment would last six to twelve months, at which time Herr would be terminated.

Herr performed well in his new job. His 1994 performance review indicated he achieved or exceeded expectations. In the summer of 1994, Herr's then supervisor, Stroud, moved to another position, creating an opening for a new director of sales financial services. Mulhern did not even consider Herr for the job, although Mulhern admitted Herr was doing a very good job. Instead, Mulhern's candidates were Jim Bidwell, Carol Scoville and Anne Witler Woods, all of whom were in their early thirties.

In February 1995, Mulhern gave the position to Woods, even though he was aware that Woods, like Stroud, her predecessor, lacked the minimum requirements for the job, including 10 years of business experience.

Herr learned of Woods's promotion to director of sales financial services and felt shocked and betrayed. He asked Mulhern whether he was passed over because of his age. Mulhern did not respond. Herr told Mulhern he couldn't take it anymore and there was nothing he could do but leave. Mulhern replied, "I knew you would . . . this is the straw that broke the camel's back."

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[7] Mayhall, at age 48, had spoken to Mulhern about becoming a division president. Mulhern told him he was "a little long in the tooth" to be talking about promotion.

[8] DeMartini, who was in his early thirties, was not laid off, despite his failure to perform satisfactorily.

On March 22, 1995, Herr gave written notice of his resignation, effective April 14, 1995. Woods asked Herr to remain for another eight to twelve weeks to complete a certain project. Herr agreed, hoping to salvage his career by demonstrating his value to the company. He continued to do an excellent job. [9] After that project ended, Herr finally left Nestlé on June 30, 1995.

2. *Proceedings*.

Herr filed suit against Nestlé on February 7, 1997. The operative second amended complaint alleged two causes of action: age discrimination under the FEHA and unfair competition (Bus. & Prof. Code, § 17200). [10]

a. *Jury trial on Herr's age discrimination claim.*

Herr's age discrimination claim was tried to a jury. Numerous witnesses were called, including Herr, Mulhern, Person, Mayhall, Wallace, Stroud, Alders and Bredeson, referred to *ante.* After Herr rested, Nestlé moved for nonsuit on the issues of constructive discharge and punitive damages. [11] The trial court granted Nestlé's motion for nonsuit solely as to punitive damages.

The jury returned a special verdict, finding on a nine to three vote that Nestlé intentionally discriminated against Herr on the basis of his age and that Herr was constructively discharged because of his age, and awarded Herr $5,163,600 in damages.

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[9] Woods testified Herr did an excellent job for her. Further, a thank you note from Woods to Herr, which was received in evidence at trial, stated: "Richard, I want to thank you for your tireless dedication. *I know I would not have survived these past few months without your help*. Your [*sic*] an admirable man. Best wishes, Anne." (Italics added.)

[10] The second amended complaint also included a cause of action for age discrimination based on a theory of disparate impact. However, that cause of action was eliminated on summary adjudication.

[11] Although Nestlé's counsel characterized the motion for nonsuit as a request for a directed verdict, that was a misnomer. A motion for directed verdict lies after all the parties have completed their presentation of evidence in a jury trial (Code Civ. Proc., § 630, subd. (a)), as contrasted with a nonsuit motion, which may be made after the plaintiff's presentation of his or her evidence. (Code Civ. Proc., § 581c, subd. (a).)

b. *Court trial on the UCL claim.*

The following day, the trial court, by stipulation sitting without a jury, heard the unfair competition claim. Following argument, the trial court permanently enjoined Nestlé "from discriminating on the basis of age, 40 and over, in promotions of employees"; directed Nestlé to issue to all employees a repudiation of the 1994 objectives memorandum wherein Maucher directed that Nestlé "[c]ontinue hiring, identifying and developing young people to have in the long-term enough resources for future management"; and ordered dissemination of the final judgment, including the repudiation, to all Nestlé, USA employees.

c. *Subsequent proceedings*.

On May 25, 2000, the trial court entered judgment.

Nestlé moved for JNOV and for new trial. Nestlé contended, inter alia, there was no substantial evidence to support the verdict, the evidence did not support an injunction on the UCL claim, the damages were excessive and were the product of passion and prejudice, evidentiary and instructional errors denied Nestlé a fair trial, and at a minimum the damages should be reduced.

On July 19, 2000, the trial court denied Nestlé's post-trial motions, finding, inter alia, the evidence "showed a continuous pattern of age discrimination," and the damage award was within the realm of generally accepted standards and represented an acceptance of the testimony of plaintiff's expert and a rejection of the defense expert.

On September 11, 2000, the trial court awarded Herr attorney fees in the sum of $1,788,159.38 pursuant to the FEHA and Code of Civil Procedure section 1021.5, the private attorney general statute.

Nestlé filed a timely notice of appeal from the judgment and from the order denying its motion for JNOV. (Cal. Rules of Court, rule 3, subds. (a) & (c).) [12]

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[12] Although Nestlé's August 17, 2000 notice of appeal also purports to appeal the denial of its motion for new trial, an order *denying* a new trial is not appealable. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 123, p. 188.)

Herr filed a timely notice of cross-appeal from the judgment, seeking review of the order granting nonsuit on the punitive damages claim. (Cal. Rules of Court, rule 3(e).) Nestlé thereafter timely appealed the trial court's postjudgment order re attorney fees. (Code Civ. Proc., § 904.1, subd. (a)(2).) The various appeals were consolidated.

## I. NESTLÉ'S APPEAL

### CONTENTIONS

Nestlé contends: the trial court erred in denying its motion for JNOV on the age discrimination and unfair competition claims; the trial court erred in denying the motion for new trial; the trial court erred in not significantly remitting the damages; and the attorney fee award should be reversed or substantially reduced.

### DISCUSSION

[[Begin nonpublished portion.]]

[[1. *Trial court properly denied Nestlé's motion for JNOV on the age discrimination claim.*[13]

a. *No merit to Nestlé's contention the jury did not determine whether the February 1995 failure to promote was age-related.*

By way of background, the trial court instructed the jury that Herr filed a discrimination charge with the California Department of Fair Employment and Housing on January 29, 1996, and therefore Herr could not recover damages for any discriminatory conduct which occurred prior to January 29, 1995. The trial court explained to the jury that the evidence "concerning actions by [Nestlé] before January 1995 has been admitted for the limited purpose of explaining [Herr's] reason for

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[13] When an appellant "attacks the judgment on the ground that the evidence is insufficient to support the verdict, the appellant is required to set forth in its brief all the material evidence on the subject and not merely evidence which it believes supports its contention, or the claim of error will be deemed to be waived. [Citations.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1027-1028.) Although Nestlé's briefing failed to set forth the evidence in the required manner, in the interests of justice we have reviewed the record and resolve the matter on the merits.

resigning from Nestlé effective June 30, 1995, *and as background evidence relating to the charge that he was denied the February 1995 promotion because of his age*. That earlier evidence is not admitted to establish any independent actionable conduct of defendant including denial of promotions which was the subject of the earlier evidence." (Italics added.)

Nestlé now contends the jury did not make a determination as to whether the pivotal February 1995 failure to promote (when Herr was passed over for the position of director of sales financial services) was age-based, and therefore this court cannot uphold a finding of liability for age discrimination. Nestlé bases its argument on the fact that the special verdict form did not ask the jury to find whether Nestlé failed to promote Herr in *February 1995* because of his age. In this regard, the special verdict form simply asked "Did Defendant intentionally discriminate against Plaintiff on the basis of his age" and "Was Plaintiff constructively discharged by Defendant because of his age?"

The argument fails. The trial court expressly instructed the jury that it was to determine whether Herr "was discriminated against because of his age by being denied a promotion *in February 1995*." (Italics added.) We presume the jury followed the instructions. (*People v. Szarvas* (1983) 142 Cal.App.3d 511, 524.) Merely because the special verdict form did not specify the February 1995 promotion does not support Nestlé's claim that the jury did not determine whether the February 1995 failure to promote was age-related. **14**

b. *JNOV standard of review.*

"A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the

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**14** We further note the special verdict form proposed by Nestlé was essentially the same as the one which was submitted to the jury. Nestlé's proposed special verdict form stated: "Did Defendant intentionally discriminate against Plaintiff on the basis of his age when it refused to give Plaintiff a promotion?" Thus, Nestlé's proposed verdict form made no attempt to limit the question to the February 1995 failure to promote.

verdict, that there is no substantial evidence in support. [Citation.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

c. *Denial of JNOV was proper because substantial evidence supports jury's determination that Nestlé's failure to promote Herr was motivated by age bias.*

The evidence recited above constitutes substantial evidence to support the jury's determination that Herr was denied the February 1995 promotion on account of his age. Specifically, the evidence showed it was company policy to eliminate so-called "deadwood" and "to promote young, energetic people in management positions," rather than those who were "long in the tooth." That policy repeatedly hindered Herr's advancement, who was passed over for positions for which he was qualified in favor of younger employees who lacked the minimum posted requirements. When Herr asked Alders in the human resources department why he wasn't even able to get an interview for two vacant positions, Alders responded that Bredeson, the hiring manager, "had made a comment to him that this would be my last promotion." Therefore, there is abundant evidence that the February 1995 failure to promote Herr was just one more manifestation of Nestlé's discriminatory policy of denying promotions to employees in their forties or older.

In sum, because Herr's age discrimination claim is supported by substantial evidence, Nestlé was not entitled to a JNOV on that cause of action.

d. *No merit to Nestlé's challenge to the sufficiency of the evidence to establish constructive discharge*.

Nestlé further contends it was entitled to a JNOV on the age discrimination claim because a failure to promote, even if discriminatory, is insufficient to establish constructive discharge. The argument is meritless.

(1) *General principles*.

Constructive discharge occurs "when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the

employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation. [Citation.]" (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1244-1245.)

An employee "cannot simply 'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. *The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.* [¶] ' "An employee may not be unreasonably sensitive to his [or her] working environment . . . . Every job has its frustrations, challenges, and disappointments; these inhere in the nature of work. An employee is protected from . . . unreasonably harsh conditions, in excess of those faced by his [or her] co-workers. He [or she] is not, however, guaranteed a working environment free of stress." ' [Citation.] [¶] In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. [Fn. omitted." (*Turner, supra*, 7 Cal.4th at pp. 1246-1247, italics added.)

(2) *Substantial evidence supports finding that Herr was constructively discharged in June 1995*.

Citing *Cloud v. Casey* (1999) 76 Cal.App.4th 895, Nestlé argues the mere denial of a promotion does not constitute working conditions so intolerable they would compel a reasonable person to resign. (76 Cal.App.4th at p. 903.) *Cloud* is distinguishable. There, the plaintiff was denied two promotions over a six-year period. (*Id*. at pp. 903-904.) Here, in contrast, as the trial court found, there was a " 'continuous pattern' " of a denial of promotions which made Herr's situation intolerable. (*Turner, supra*, 7 Cal.4th at p. 1247.)

Further, as *Turner* explains, the "*proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.*" (*Turner, supra*, 7 Cal.4th at p. 1246, italics added.) *Turner* reiterated the "employee's resignation *must be employer*-coerced, not caused by the voluntary action of the employee . . . ." (*Id*. at p. 1248.)

Here, there is substantial evidence the June 1995 departure was employer-coerced. Finally, after Herr was passed over for the February 1995 promotion, which went to Woods, Herr told Mulhern he couldn't take it anymore and there was nothing he could do but leave. Mulhern responded, "*I knew you would . . . this is the straw that broke the camel's back.*" (Italics added.) Based thereon, the jury reasonably could conclude the February 1995 denial of a promotion was part of a continuous pattern of discrimination which was calculated to induce Herr to resign from Nestlé.

Moreover, Nestlé's attempt to characterize Herr's resignation as a voluntary decision is contrary to the record. As indicated, in February 1994, after two months in a new position which was to lead to advancement, Mulhern gave Herr a layoff notice and told him his job was being eliminated. Before Herr's scheduled departure date, Mulhern offered him a temporary position, a position that was itself slated for elimination within six to twelve months, at which time Herr would be terminated. On March 22, 1995, after learning that he had been passed over for the position which went to Woods, Herr gave written notice of his resignation, effective April 14, 1995. Herr was asked to remain for another eight to twelve weeks to complete a certain project. He agreed, hoping to salvage his career by demonstrating his value to the company. After that project ended, Herr left Nestlé on June 30, 1995.

Thus, at the time Herr finally left Nestlé in mid-1995, the temporary one-year job he received after his February 1994 layoff notice was about to expire.

For all these reasons, Nestlé was not entitled to a JNOV on its theory there was insufficient evidence of a constructive discharge.]]

[[End nonpublished portion.]]

2. *Trial court properly enjoined Nestlé under the UCL from engaging in age discrimination against employees age 40 and older.*

a. *No merit to Nestlé's contention it was entitled to JNOV on the UCL claim; the UCL claim was decided by the court, not the jury, and therefore a JNOV does not lie.*

As a preliminary matter, Nestlé contends the trial court should have granted JNOV on the unfair competition claim. The argument fails.

As indicated, after the jury returned its verdict on the age discrimination claim, the trial court, by stipulation sitting without a jury, heard the UCL claim. The JNOV procedure, by definition, applies to jury trials, and a trial judge should grant a motion for JNOV where the jury returns a verdict which is not supported by substantial evidence or by reasonable inferences to be drawn therefrom. (Code Civ. Proc., § 629; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.) Because the instant UCL claim was decided by the court, not the jury, Nestlé's contention it was entitled to JNOV on the unfair competition claim is groundless.

However, moving beyond the procedural flaw in Nestlé's contention, we turn to the substantive issue of whether the trial court properly enjoined Nestlé under the UCL from "discriminating on the basis of age, 40 and over, in promotions of employees."

b. *Age discrimination in violation of the FEHA is an unlawful employment practice which may be enjoined under the UCL; the UCL's remedies are cumulative.*

Business and Professions Code section 17200 defines unfair competition as including "any *unlawful*, unfair or fraudulent business act or practice . . . ." (Italics added.) The UCL authorizes injunctive relief to prevent unfair competition. (Bus. & Prof. Code, § 17203.) **15**

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**15** In addition to injunctive relief to prevent unfair, unlawful or fraudulent business acts or practices, the UCL authorizes restitution or disgorgement of money or property unlawfully obtained. (Bus. & Prof. Code, § 17203; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.) This case solely concerns the injunctive aspect of the UCL.

Here, the evidence established that it was Nestlé's practice to promote young people in management positions to the detriment of their more mature colleagues, such as Herr. The FEHA makes it an unlawful employment practice for an employer to engage in age discrimination. (Gov. Code, § 12940, subd. (a).) It follows that injunctive relief under the UCL is an appropriate remedy where a business has engaged in an unlawful practice of discriminating against older workers.

Nestlé contends it did not engage in unlawful age discrimination and therefore the unfair competition claim must fall together with the age discrimination claim. This argument fails because, as discussed in the previous section, there is substantial evidence to support the jury's determination Nestlé did discriminate against Herr on account of his age.

Nestlé also contends the unfair competition law is intended to protect consumers and competitors, not employees, and therefore Herr's remedy for age discrimination is limited to the FEHA. The argument is meritless. Business and Professions Code section 17205 specifically provides, "Unless otherwise expressly provided, the remedies or penalties provided by this chapter are *cumulative to each other and to the remedies or penalties available under all other laws of this state*." (Italics added.)

Further, an action for injunctive relief under the UCL may be brought "by any person acting for the interests of itself, its members or the general public." (Bus. & Prof. Code, § 17204.) "The courts in California have consistently upheld the right of both individual persons and organizations under the unfair competition statute to sue on behalf of the public for injunctive relief as 'private attorney[s] general,' even if they have not themselves been personally harmed or aggrieved. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 929 [216 Cal.Rptr. 345, 702 P.2d 503]; *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 70-73 [164 Cal.Rptr. 279].)" (*Consumers Union of United States, Inc. v. Fisher Development, Inc*. (1989) 208 Cal.App.3d 1433, 1439 [action against developer of adult community to enjoin discrimination in housing].) *A fortiori*, Herr, who was personally aggrieved by the age discrimination practiced at

Nestlé, had the right under Business and Professions Code section 17204 to sue as a private attorney general to enjoin Nestlé from engaging in unlawful employment discrimination.

Further, although Nestlé's counsel argued below that age discrimination is an "intra company" matter which is not injurious to competitors or consumers, the trial court properly rejected that argument. Actual injury to competition is *not* a required element of proof of a violation of Business and Professions Code section 17200. (*People ex rel. Van de Kamp v. Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 760; Stern, Bus. & Prof.C. § 17200 Practice (The Rutter Group 2003) § 3:17, p. 3-3.)

Further, Business and Professions Code section 17200 has been applied in the employment context. In *Cortez v. Purolator Air Filtration Products Co*. (2000) 23 Cal.4th 163, the Supreme Court held unlawfully withheld overtime wages may be recovered as restitution in a UCL action. (*Id*. at p. 173.) The failure to pay statutorily mandated overtime wages constitutes unfair competition in that an employer which fails to pay overtime wages gains an unfair advantage over its competitors.

By a parity of reasoning, age discrimination likewise implicates unfair competition. It is self evident that older workers, who have worked their way up the ranks, frequently are more highly compensated than their younger colleagues. Thus, an employer which practices age discrimination may have an unfair competitive edge over employers who comply with the FEHA. Therefore, an employer which engages in age discrimination in violation of the FEHA is subject to a prohibitory injunction under the UCL.

For these reasons, the trial court properly enjoined Nestlé under the UCL from engaging in age discrimination in violation of FEHA.

[[Begin nonpublished portion.]]

[[3. *No merit to Nestlé's contentions relating to the denial of its motion for new trial.*

a. *No merit to Nestlé's contention the credible evidence was insufficient to support the verdict*.

Nestlé contends that as an alternative to the JNOV, the trial court should have granted a new trial because the overwhelming weight of the credible evidence leads to the conclusion Herr was not constructively discharged, that age did not motivate Mulhern's February 1995 promotion decision, and that Nestlé did not violate Business and Professions Code section 17200.

For the reasons previously discussed, these arguments are unavailing.

b. *No merit to Nestlé's contention the improper admission of certain evidence denied it a fair trial*. **16**

(1) *Admission of the Maucher memorandum*.

Nestlé contends the trial court should have excluded a 1993 memorandum authored by Maucher, setting forth the company's objectives for 1994. The section of the memorandum pertaining to human resources policies contained the following sentence: "*Continue hiring, identifying and developing young people to have in the long-term enough resources for future management*." (Italics added.) Nestlé contends this language is plainly innocuous, lacks any probative value, and the mere reference to

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**16** Our review is governed by Evidence Code section 353, which provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

young people inflamed the jury and prejudiced Nestlé's defense. The argument is meritless.

The record reflects Nestlé objected to the Maucher memorandum "on relevance and [Evidence Code section] 352 grounds," which objections were overruled. We perceive no abuse of discretion in the trial court's ruling. The trial court was not bound by Nestlé's argument this was an innocuous document. The Maucher memorandum was facially discriminatory and relevant to Herr's theory he was held back at Nestlé on account of company policy favoring younger workers. Further, Cam Starrett, an executive vice president of human resources at Nestlé USA, testified the memorandum's "statement for human resources is not applicable in the United States. *It's against the law in the United States*." (Italics added.) On this record, the trial court properly admitted the memorandum as relevant. It was then for Nestlé to argue the Maucher memorandum was being misinterpreted or that Herr had taken the sentence in issue out of context. Thereafter, the significance of the Maucher memorandum was a matter for the jury, which weighed the memorandum as part of the totality of the evidence presented in the case.

(2) *Admission of certain stray remarks.*

In a footnote, Nestlé contends the trial court should have excluded the "long in the tooth" comment, well as the testimony of former employee James Person, concerning ageist comments made by his supervisor. Nestlé contends these remarks were irrelevant, inflammatory and highly prejudicial. The record reflects Nestlé failed to object on these grounds below and thereby waived these objections.

Specifically, with respect to the "long in the tooth" comment, Herr testified Mayhall told him that Mulhern had commented to Mayhall "that he was getting a little bit long in the tooth." The record reflects Nestlé's objection at that juncture was hearsay, not the grounds now being argued. Therefore, the objections now being raised were not properly preserved for appeal. (Evid. Code, § 353.)

With respect to Person's testimony, he testified his supervisor, Mason, said Carnation employees were older employees, with an average age of 43 and with 15 or 17 years of service and it was "Nestlé's policy to promote young, energetic people in management positions." According to Person, Mason remarked that Carnation "had a lot of deadwood in it" and instructed that staff "see about getting rid of the deadwood." During that colloquy, Nestlé's counsel objected solely on the grounds that plaintiff's counsel was leading the witness. Therefore, Nestlé's contention this testimony should have been excluded as irrelevant and inflammatory likewise is not properly before this court. (Evid. Code, § 353.)

(3) *Admission of statistical evidence relating to Nestlé's hiring practices.*

Nestlé contends the trial court should have excluded statistical evidence of its *hiring* practices because those statistics did not take into consideration the ages and qualifications of applicants and were immaterial to the issue before the jury: whether the denial of the February 1995 *promotion* was motivated by age discrimination.

Dr. Philips, an econometrician called by Herr, testified that age was a statistically significant factor in looking at *promotions* in the years 1991 through 1994, and in each of those cases, people over 40 had less than half the probability of being promoted relative to someone under 40, again allowing the computer to consider the effects of job tenure, education and salary. Dr. Philips also presented evidence of Nestlé's *hiring* practices, evidence which he conceded was not statistically significant.

Nestlé's opening brief does not challenge the admission of Dr. Philips's statistical evidence with respect to discrimination in *promotions*.[17] Further, Nestlé acknowledges the pertinent issue is whether the February 1995 *promotion* decision was motivated by age discrimination. Because the issue in this case is Nestlé's failure to promote Herr, not

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[17] For the first time in its reply brief, Nestlé contends Herr's statistical evidence relating to *promotions* was also riddled with analytical flaws. An appellant's failure to raise an issue in its opening brief waives the issue on appeal. (*Tisher v. California Horse*

Nestlé's hiring practices, we reject the contention Nestlé was somehow prejudiced by Dr. Philips's testimony concerning Nestlé's hiring practices, particularly in view of Dr. Philips's recognition his evidence concerning Nestlé's hiring practices was statistically insignificant.

c. *No merit to Nestlé's contention prejudicial instructional error denied it a fair trial.*

(1) *Alleged instructional error regarding Nestlé's promotion decisions preceding the February 1995 decision to promote Woods rather than Herr.*

In a pretrial ruling, the trial court ruled Herr's claims relating to any pre-February 1995 personnel decisions were time-barred, but that evidence of those earlier decisions would be allowed for the limited purpose of showing a continuous course of conduct which finally forced Herr to quit. Nestlé contends the trial court failed to instruct the jury in accordance with the pretrial ruling.

Specifically, Nestlé contends the trial court failed to give a single jury instruction that separately laid out the elements of Herr's discriminatory failure to promote claim, as distinct from his constructive discharge theory. The argument is contrary to the record, which reflects the trial court clearly delineated the elements of a claim for employment discrimination based upon disparate treatment consisting of a failure to promote, and thereafter, the elements of a claim for constructive discharge.

Nestlé also complains the special verdict form failed to specify the February 1995 timeframe. However, as discussed in footnote 14, *ante*, the special verdict form proposed by Nestlé was essentially the same as the one which was submitted to the jury. Nestlé's proposed special verdict form stated: "Did Defendant intentionally discriminate against Plaintiff on the basis of his age when it refused to give Plaintiff a promotion?" Thus, Nestlé's proposed verdict form made no attempt to limit the question to the February 1995 failure to promote.

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*Racing Bd.* (1991) 231 Cal.App.3d 349, 361.) Therefore, Nestlé's attack on Herr's promotion statistics merits no discussion.

Further, irrespective of the language of the special verdict form, the trial court expressly instructed the jury it was to determine whether Herr "was discriminated against because of his age by being denied a promotion *in February 1995*" and whether "he was constructively discharged in *June 1995* because of age discrimination." (Italics added.) Thus, the trial court properly instructed the jury, in accordance with its pretrial ruling, as to the limited scope of Herr's claims at trial.

Further, the trial court instructed the jury that "[u]nder California law you may not award damages to the plaintiff for conduct that you believe constitutes age discrimination if that conduct occurred before January 29th, 1995. [¶] *The evidence presented concerning actions by defendant before January 1995 has been admitted for the limited purpose of explaining plaintiff's reason for resigning from Nestlé effective June 30th, 1995, and as background evidence relating to the charge that he was denied the February 1995 promotion because of his age. That earlier evidence is not admitted to establish any independent actionable conduct of defendant including denial of promotions which was the subject of the earlier evidence.* [¶] Defendant is under no legal obligation to justify its decisions made prior to January 1995 regarding plaintiff including those made in relation to promotion." (Italics added.)

Accordingly, there is no merit to Nestlé's contention the instructions which were given allowed the jury to base its age discrimination verdict on the pre-February 1995 denials of promotions or transfers.

(2) *Denial of BAJI No. 14.61.*

Nestlé contends the trial court erred in refusing to give BAJI No. 14.61, which provides: "Do not include as damages any amount that you might add for the purpose of punishing or making an example of the defendant for the public good or to prevent other accidents. Those damages would be punitive and they are not authorized in this action." Nestlé argues it was entitled to the instruction because in closing argument Herr's counsel referred to Nestlé as a "corporate crook" and urged the jury not to let Nestlé "get away with it."

However, the corporate crook statement by Herr's counsel was prefaced by the phrase, "[A]s relates to age discrimination." Further, contrary to Nestlé's contention, Herr's counsel did not ask the jury to "punish" Nestlé. Herr's counsel merely asked the jury to "fully compensate him for the damages that they have caused."

Nestlé does not cite any authority for the proposition that on this record, it was entitled to BAJI No. 14.61. Nor has Nestlé shown how it was prejudiced by the denial of the instruction. We decline to speculate from the size of the verdict that it includes an award of punitive damages. Therefore, the contention relating to BAJI No. 14.61 fails.

(3) *Denial of managerial discretion instruction*.

Nestlé contends the trial court erred in refusing its proposed instruction to the effect the jury could not substitute its judgment for the managerial discretion of Nestlé in selecting candidates for promotion. This was a special instruction drawn by Nestlé from language in *Los Angeles County Dept. of Parks & Recreation v. Civil Service Com.* (1992) 8 Cal.App.4th 273, 281.)

The trial court properly refused to give the instruction because its substance was adequately covered by the given instructions. The jury was specifically instructed that the plaintiff had the burden of proving discrimination and needed to provide "proof that the defendant intentionally discriminated against the plaintiff because of plaintiff[']s age 40 and over," that "plaintiff's age was a motivating factor in the defendant's actions towards plaintiff," and that there "was a causal connection" between plaintiff's age and the adverse actions of the defendant, and most significantly, "defendant is entitled to defend itself against the charge of intentional age discrimination *by producing evidence to show that it has a non-discriminatory reason for refusing to promote the plaintiff*." (Italics added.)

Thus, these instructions advised the jury Herr could not prevail unless he proved his age was a motivating factor in the denial of the February 1995 promotion, and left Nestlé free to argue its refusal to promote Herr in February 1995 was based on a

discretionary managerial decision that Woods was the better qualified candidate. We perceive no error in the trial court's ruling.

d. *No merit to Nestlé's contention the damage award was motivated by passion and prejudice*.

(1) Standard of review.

We have "very narrow appellate review of the jury's determination of the amount of compensation" for Herr's damages. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614.) The reviewing court "ordinarily defers to the trial court's denial of a motion for new trial based on excessive damages, because of the trial judge's greater familiarity with the case. [Citations.] The trial judge has greater discretion to reduce the damages on a motion for new trial than the appellate court has on appeal. If the trial judge denied the motion, concluding the award was not excessive, the appellate court gives weight to the trial court's conclusion. [Citations.]" (*Ibid*.) A reviewing court may not interfere with an award of damages unless the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.)

(2) *Trial court's ruling.*

In ruling on the motion for new trial with respect to the issue of excessive damages, the trial court recalled that Herr's counsel, in closing argument, stated "[o]n the emotional distress, . . . we leave it up to you, somewhere in the range between 2 and 4 million might be appropriate," and that the jury "clearly . . . bought the plaintiff's compensatory damage evidence."

In its minute order, the trial court reiterated "the jury awarded almost exactly what plaintiff asked the jury to award." The trial court concluded it saw "no reason to disturb the amount of the award given by the jury. The award is not outside the realm of generally acceptable standards relating to the ratio between special damages and general damages. The jury obviously felt that plaintiff's emotional distress was significant and has lasted for several years."

(3) *No merit to contention the award was motivated by passion and prejudice.*

The verdict form did not segregate the various items of damage. However, there is substantial evidence to support the conclusion Herr's economic damages exceeded $2 million, based on the expectation he would have remained at Nestlé for another 14 years, until age 62. Had Herr, rather than Woods, received the February 1995 promotion, he would have earned $155,000 per annum, with a potential bonus of 30 to 45 percent of base pay. Therefore, it is reasonable to conclude that about $2 million of the $5.1 million awarded by the jury represents economic damages. [18]

Thus, the non-economic damages awarded by the jury are in the range of $3 million. At the hearing on the motion for new trial, Nestlé's counsel conceded that "three times compensatory, just as a concept, is not necessarily out of line." The "problem," according to Nestlé's counsel at the hearing, was that "the economic damages . . . [are] not supported by the evidence in our view either." As already discussed, the economic damages have ample support in the record. Therefore, the non-economic damages are not disproportionate to the economic damages awarded by the jury.

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[18] Front pay as well as back pay is authorized in California. "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment." (*Parker v. Twentieth Century-Fox Film Corp*. (1970) 3 Cal.3d 176, 181-182.) The record reflects Herr sought to mitigate his damages but continued to earn far less than he did, or would have, at Nestlé. When Herr left Nestlé, he was earning $71,250 plus benefits. In 1996, he earned $5,737. He then began taking temporary and contract work, and earned $24,000 in 1997, $51,725 in 1998, and $60,452 in 1999. Despite a diligent job search, he did not receive any offer of a permanent full time job.

Further, as the trial court pointed out, the jury essentially accepted Herr's evidence and arguments and rejected Nestlé's position. In closing argument, Herr's counsel proposed a figure of three to five million dollars in general damages for emotional distress, but Nestlé's counsel did not propose an alternative figure. The fact the jury ultimately sided with Herr rather with Nestlé does not support the inference the jury acted out of passion and prejudice.[19]

4. *Award of attorney fees to Herr was proper.*

The trial court awarded attorney fees to Herr on two bases, that he was the prevailing party under the FEHA and under California's private attorney general statute, Code of Civil Procedure section 1021.5. Nestlé's opening brief, in one and a half pages, agues the $1,788,159 award of attorney fees was excessive in that (1) the lodestar amount of $1,192,106 was unreasonable because Herr's attorneys' hours were grossly excessive; and (2) the 1.5 multiplier used to enhance the attorney fees was not warranted. We address these arguments seriatim.

a. *Nestlé has not demonstrated the attorney hours were excessive*.

After citing the general rule that attorney fee awards should include only hours reasonably spent (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639), Nestlé flatly asserts the 3,320 hours expended by Herr's two trial counsel "are unreasonably excessive on their face." The opening brief is devoid of any further discussion of the issue. There is no analysis of the hours expended, or why such hours were excessive.

Further, the trial court ruled the hours charged "are not disputed and the court finds no basis for reduction based on claimed duplication work, excessiveness, re-preparation, or unsuccessful claims." The opening brief does not even discuss this ruling of the trial court, let alone make any attempt to show the ruling was error.

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[19] We note that in moving for a new trial on the ground of excessive damages, Nestlé did not proffer any declarations from the three dissenting jurors to support its post-trial claim of juror passion and prejudice.

Therefore, we reject Nestlé's contention the trial court awarded attorney fees to Herr for hours that were unnecessary, redundant or unreasonable.

b. *No abuse of discretion in applying a 1.5 multiplier to the lodestar amount.*

Nestlé contends the trial court abused its discretion in applying a multiplier because of the availability of statutory attorney fees to Herr. Nestlé asserts a lodestar multiplier is improper where, as here, statutory attorney fees are available. The argument fails. A lodestar multiplier "applies to a statutory fee award unless the statutory authorization for the award provided for another method of calculation." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135.)

The purpose of a lodestar enhancement is to compensate the attorney who agrees to undertake such representation at the risk of nonpayment or delayed payment, in an amount approaching the market rate for comparable legal services. (*Ketchum v. Moses, supra*, 24 Cal.4th at p. 1136.) In reviewing the trial court's decision to apply a lodestar multiplier, we are mindful the trial court is in the best position to determine the value of counsel's services and we review the ruling for an abuse of discretion. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1407, 1418.)

Here, in applying a multiplier, the trial court explained it considered the inherent risk and contingency of this case. The trial court found this was a novel and difficult case in that Herr was close to 40 when he was wrongfully terminated, unlike a more traditional age discrimination situation where the plaintiff is significantly older.

The trial court further found the hours put into the case by Herr's attorneys and their support staff "precluded other, perhaps more certain and stable, income-producing activity." Also, Herr had "a substantial wait for the successful completion of his day in court." In addition, "[t]he risk of loss to plaintiff was substantial throughout the case, until the introduction into evidence of the 'Maucher' memo. In the court's opinion, the memo was very significant and up until the first few days of trial, it was uncertain whether that memo was admissible. The memo sets an aura, a guideline, a policy that youth was to be a primary concern regarding the development of employees within the

corporation. That being the case, *plaintiff* was on the road to nowhere in an age discriminating company. The result of this case precludes that happening now." Further, in addition to vindicating Herr's interest, the injunction "has a great deal of significance not only to the remaining employees, but to similarly situated employees in other similar companies." Based on all these considerations, the trial court found 1.5 was a reasonable multiplier.

In view of the above, the trial court had ample grounds to apply a lodestar multiplier. We find no abuse of discretion.

For these reasons, we uphold the attorney fee order in its entirety.

## HERR'S CROSS-APPEAL

## CONTENTIONS

Herr contends the trial court erred in granting nonsuit on his punitive damages claim.

## DISCUSSION

1. *General principles governing standard for imposition of punitive damages*.

As discussed in *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, "In 1980, the Legislature began modifying the substantive elements of punitive damage awards. It limited the circumstances under which an employer could be held liable for punitive damages 'based upon acts of an employee.' (Civ. Code, § 3294, subd. (b).) At the same time, the concepts of 'oppression,' 'fraud,' and 'malice' were given specific definitions. (*Id*., § 3294, subd. (c).) . . . . [¶] Additional requirements were imposed by the [1987 Reform Act]. . . . [It] amended Civil Code section 3294 by increasing the plaintiff's burden of proving punitive damages at trial to 'clear and convincing evidence.' The definition of 'malice' was also refined. For plaintiffs attempting to prove malice by showing a 'conscious disregard' of their rights as opposed to an actual intent to harm, the [statute] imposed additional requirements of 'despicable' and 'willful' defense conduct." (8 Cal.4th at pp. 712-713.)

Thus, Civil Code section 3294 presently provides in pertinent part at subdivision (c): "As used in this section, the following definitions shall apply: [¶] (1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. [¶] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. [¶] (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

2. *A claim for punitive damages must be evaluated in light of the applicable evidentiary standard*.

Nestlé's nonsuit motion was properly granted only if it appeared from the evidence, viewed in the light most favorable to Herr, that there was no substantial evidence supporting a punitive damage claim. (*Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 481.) In making this evaluation of the evidence the trial court may not weigh the evidence or judge the credibility of witnesses. (*Ibid*.)

Because a claim for punitive damages must be supported by evidence which establishes by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, if a plaintiff is to recover on such a claim, it will be necessary that the evidence presented meet this higher evidentiary standard. (*Stewart v. Truck Ins. Exchange, supra*, 17 Cal.App.4th at pp. 481-482.) "As the United States Supreme Court put it, in the context of ruling on a motion for summary judgment, 'the judge must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden . . . . [¶] Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury.' (*Anderson v. Liberty Lobby, Inc*. (1986) 477 U.S. 242, 254-255 [91 L.Ed.2d 202, 215-216, 106 S.Ct. 2505]; . . . .)" (*Stewart, supra*, at p. 482.)

Thus, if Herr were to prevail on his punitive damage claim he could only do so by the presentation of clear and convincing evidence that Nestlé had by its conduct, demonstrated malice, fraud or oppression. The trial court properly viewed the evidence presented by Herr with that higher burden in mind. In our review of the trial court's order granting the nonsuit, we do the same. (*Stewart, supra*, 17 Cal.App.4th at p. 482.)

3. *Trial court properly granted nonsuit on the punitive damages claim*.

As a preliminary matter, Nestlé's failure to promote Herr on account of his age does not implicate fraud. The remaining bases for punitive damages are malice and oppression. On this record, the trial court properly found Herr did not meet the criteria for any of these grounds.

As indicated, malice means "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) Nestlé's conduct in passing over Herr for promotions was not *intended* to cause injury to Herr. Further, although Nestlé acted with conscious disregard of Herr's right to be free of age discrimination, Nestlé's failure to promote Herr on account of his age did not constitute despicable conduct within the contemplation of the statute. The adjective "despicable" as used in section 3294 refers to "circumstances that are 'base,' 'vile,' or 'contemptible' " (*College Hospital Inc. v. Superior Court, supra,* 8 Cal.4th at p. 725; *Cloud v. Casey, supra*, 76 Cal.App.4th at p. 912) and represents a new substantive limitation on punitive damage awards. (*College Hospital Inc., supra,* at p. 725*; Shade Foods v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) Nestlé's refusal to promote Herr, although violative of the FEHA, did not rise to the level of conduct which is so base, vile or contemptible as to give rise to the imposition of punitive damages.

Similarly, oppression is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) Once again, although Nestlé acted with conscious disregard of Herr's right to be free of age discrimination, Nestlé's failure to promote Herr on account of his age did not amount to despicable conduct within the meaning of the statute.[20]

Accordingly, viewing the evidence presented by Herr in light of his burden to establish oppression, fraud or malice by clear and convincing evidence, we conclude the trial court properly granted nonsuit on Herr's claim for punitive damages.]]

[[End nonpublished portion.]]

**DISPOSITION**

The judgment, the order denying the motion for JNOV, and the order awarding attorney fees to Herr, are affirmed. Herr shall recover his attorney fees incurred in responding to Nestlé's appeal. Herr shall also recover costs on appeal.

**CERTIFIED FOR PARTIAL PUBLICATION**

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.

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**20** *Cloud v. Casey, supra,* 76 Cal.App.4th 895, which found sufficient evidence to support a finding that the employer acted with malice or oppression (*id.* at p. 911), is distinguishable. There, in addition to evidence that the employer intentionally discriminated against the plaintiff because of her gender when she was not selected as the company controller, the evidence showed that "the decisionmaker attempted to hide the improper basis with a false explanation . . . ." (*Id*. at p. 912.) Therefore, the "jury could properly conclude that the corporations intentionally discriminated by denying Ms. Cloud a promotion based on gender, then attempted to hide the illegal reason for their decision with a false explanation, and that in this, they acted in a manner that was base, contemptible or vile." (*Id*. at p. 912.)